93-765

Supreme Court, U.S.
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in the Supreme Court of the United States

October Term, 1993

BELIZE TRADING, LTD. and HYBUR LTD.

Petitioners,

v.

EL PIRATA EL CARIBE, S.A., and VIANESSA, INC. and TRIPOLI IMPORTADORA, C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William B. Milliken, Esq.
Hayden and Milliken, P.A.
5915 Ponce de Leon Boulevard
Coral Gables, Florida 33146
Telephone: (305) 662-1523

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit failed to properly apply Section 3(3) of the Carriage of Goods by Sea Act, 46 U.S.C. §1303(3), by ruling that such section mandates a carrier to accept and enumerate on an ocean bill of lading the numbers of cartons listed by a shipper as being within a container where the container is loaded and sealed by the shipper, and the carrier has no reasonable means of checking those numbers.

2. Whether the United States Court of Appeals for the Eleventh Circuit's ruling that the terms of an ocean bill of lading are not effective until accepted by the shipper or consignee conflicts with established maritime precedents.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, BELIZE TRADING, LTD. ("BELIZE TRADING") and HYBUR LTD. ("HYBUR")[1], request that a writ of certiorari be issued to review an Opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 21, 1993.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit upon which review is sought (Pet.App. A) is reported at 993 F.2d 790 (11th Cir. 1993). The Memorandum Opinion and Order of Final Judgment of the United States District Court for the Southern District of Florida (Pet.App. C) is reported at 1991 AMC 2947 (S.D.Fla. 1991).

GROUNDS FOR JURISDICTION

The Opinion of the United States Court of Appeals for the Eleventh Circuit upon which review is sought, was entered on June 21, 1993. On August 16, 1993, the Court of Appeals for the Eleventh Circuit entered an Order on Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc, which denied a petition for rehearing and suggestion of rehearing en banc filed by Petitioners with respect to such Opinion (Pet.App. B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

46 U.S.C. §1303(3) and 46 U.S.C. §1304(5) are involved in this case. Such sections provide:

§1303. Responsibilities and liabilities of carrier and ship

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[1]Pursuant to Supreme Court Rule 29.1, BELIZE TRADING and HYBUR state that they have no parent corporations or subsidiaries.

* * * *

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

§1304. Rights and immunities of carrier and ship

* * * *

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. The declaration, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

STATEMENT OF THE CASE

A. The Factual History

BELIZE TRADING is a Cayman Island based company which, at all times material, was the owner of the motor vessel "HYBUR TRADER". Pursuant to agreement, the ship was operated by Petitioner, HYBUR. The ship operated as a common carrier by water for hire, engaged in regular liner service between Miami, Florida and, inter

alia, Belize. Agency services were provided to the ship and to HYBUR by Hyde Shipping, based in Miami, Florida ("HYDE").

The "HYBUR TRADER" was a container vessel, and did not carry break bulk cargo.

EL PIRATA DEL CARIBE, S.A. ("EL PIRATA"), a Respondent herein, was the consignee and owner of certain goods to be shipped on the vessel on October 8, 1987. The shipper of EL PIRATA's goods was Precision Trading Corporation ("PRECISION"), under Bill of Lading No. 127.

Respondent, VIANESSA, INC. ("VIANESSA"), was also a shipper of goods, under Bill of Lading No. 43. VIANESSA'S consignee was Respondent, TRIPOLI IMPORTADORA, S.A. ("TRIPOLI").[2]

With regard to EL PIRATA's goods, HYDE booked the cargo for sailing on the "HYBUR TRADER". At the shipper's request, HYDE contacted an independent trucker to deliver three containers to PRECISION. At PRECISION'S warehouse, the containers were stuffed and sealed by PRECISION. The trucker then delivered the containers to HYDE, where HYDE acknowledged receipt by execution of dock receipts. HYDE also received PRECISION'S commercial invoice and certain U.S. Customs forms. HYDE then issued Bill of Lading No. 127.

With regard to VIANESSA'S goods, HYDE received a shipper loaded and sealed container, along with invoices and U.S. Customs forms. HYDE also executed a dock receipt and issued Bill of Lading No. 43.

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[2]The claims of VIANESSA and TRIPOLI were paid by the INSURANCE COMPANY OF NORTH AMERICA, and they have prosecuted claims against Petitioners for the use and benefit of the INSURANCE COMPANY OF NORTH AMERICA.

On Thursday, October 8, 1987, the HYBUR TRADER left the Miami River bound for Belize. As it motored south, a tropical storm began to threaten the Caribbean. The vessel anchored off the Florida Keys in order to determine the course of the storm, specifically whether it would pass forward or astern of the vessel's position. Soon, the storm began to head towards the vessel's position, and the master attempted to return to Miami. As the vessel headed north, the tropical storm intensified, became Hurricane Floyd, and accelerated toward South Florida.

On October 12, 1987, the vessel was tantalizingly close to safe harbor when it was struck by huge waves and hurricane force winds. The pitch and roll of the vessel caused by these violent conditions eventually caused some lashing chains and turnbuckles to bend and break apart. As a consequence, a number of containers were lost over the side, including two containing cargo of Respondent, EL PIRATA, and one containing cargo of Respondent, VIANESSA. (EL PIRATA had shipped three containers, one of which was not lost.)

B. Procedural History

A large number of claims for damage to cargo were filed, including several lawsuits against HYBUR. The vessel owner, Petitioner, BELIZE TRADING filed a Petition for Exoneration from or Limitation of Liability in the District Court for the Southern District of Florida and all claims were consolidated therein.

The District Court for the Southern District of Florida had jurisdiction under 28 U.S.C. §1333, 46 U.S.C. §§183-185, Rule 9(h) of the Federal Rules of Civil Procedure and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

Virtually all claims were settled prior to trial, save for the claims of EL PIRATA and VIANESSA. As a result of the settlements, BELIZE TRADING withdrew its prayer for exoneration pursuant to agreement with opposing counsel, and in February 1991, the matter proceeded to a non-jury trial before the Honorable Federico A. Moreno in the United States District Court for the Southern District of Florida, solely on the issue of damages, and whether, Petitioners were entitled to a $500 package limitation under the Carriage of Goods by Sea Act ("COGSA").

In a Memorandum Opinion and Order of Final Judgment entered on June 24, 1991, the trial court ruled that the Respondents' recoveries were limited to $500 per sealed cargo container pursuant to the $500 per "package" limitation provisions of Section 4(5) of COGSA, 46 U.S.C. §1304(5) (Pet.App. C). On July 16, 1991, and July 19, 1991, Respondents filed Notices of Appeal upon the trial court's Final Judgment to the United States Court of Appeals for the Eleventh Circuit (Pet.App. D and E). The trial court's Final Judgment was reversed by an Opinion and Order of a panel of the United States Court of Appeals for the Eleventh Circuit dated June 21, 1993 (Pet.App. A). Petitioners thereupon filed a "Suggestion of Rehearing *En Banc*" on July 9, 1993, which petitioned the panel for rehearing and also suggested that a rehearing should be had *en banc* (Pet.App. F). The United States Court of Appeals for the Eleventh Circuit thereupon denied Petitioners' petition or rehearing and suggestion for rehearing *en banc* by an Order on Petition(s) for Rehearing and Suggestion(s) of Rehearing *En Banc* entered on August 16, 1993 (Pet.App. B).

REASONS FOR GRANTING THE WRIT

This matter involves the General Maritime Law of the United States and, in particular, whether Section 3(3) of

COGSA, 46 USC §1303(3), **mandates** a carrier to issue bills of lading which recite the numbers of cartons a shipper has listed in invoices or packing lists as being contained in sealed containers even when the shipper has packed and sealed the cargo and the carrier has no reasonable means of checking those numbers.

The Eleventh Circuit held that Petitioners "failed to adhere to the law" as provided in Section 3(3) of COGSA by listing upon bills of lading (Pet.App. G and H) the containers which Respondents had packed and sealed as three 40-foot and one 20-foot containers "said to contain electronic equipment" or "color television sets and radio cassette recorders", rather than merely parroting the number of cartons recited in Respondents' invoices and/or packing lists. It thereupon held that the $500 per package limitation of liability provided for by Section 4(5) of COGSA, 46 USC §1304(5), should, therefore, be computed based upon the large number of alleged individual cartons listed by the shippers, as opposed to the three lost containers in which those cartons were shipped (Pet.App. A).

This matter also involves whether, under COGSA, ocean bills of lading cannot be binding upon a shipper or consignee until they are actually accepted by the shipper and consignee. The Eleventh Circuit held that the bills of lading prepared by the carrier had not been and could not be deemed "accepted" by the Respondents because they were not issued until after the "HYBUR TRADER" had left port and Respondents' containers had been lost at sea. This holding is totally unsupported by the record and flies in the face of numerous decisions which have long held that the usual terms and conditions of bills of lading are deemed to be valid and controlling even when they are issued only after a loss, based upon common business experience and practice.

The Eleventh Circuit's decisions involve legal questions going to the essence of COGSA and emasculate the meaning and intent of COGSA. We respectfully submit that this Court should review the decision of the Eleventh Circuit to resolve these important questions.

I.

THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI BECAUSE THE ELEVENTH CIRCUIT'S RULING THAT SECTION 3(3) OF COGSA REQUIRES A CARRIER TO ACCEPT AND ENUMERATE ON AN OCEAN BILL OF LADING THE NUMBER OF CARTONS LISTED BY A SHIPPER AS BEING WITHIN A CONTAINER LOADED AND SEALED BY THE SHIPPER IMPROPERLY EMASCULATES COGSA SECTION 3(3)(c) WHICH PROVIDES THAT A CARRIER IS NOT REQUIRED TO STATE QUANTITIES IN A BILL OF LADING THAT HE HAS NO REASONABLE MEANS OF CHECKING

The Eleventh Circuit panel ruled that COGSA *mandated* that the carrier list the number of packages disclosed to the carrier, via invoices and packing lists, concerning shipper loaded and sealed containers. In particular, the panel relied on 46 USC § 1303(3)(b) as requiring the carrier to list the number of packages "as furnished in writing by the shipper."

The containers at issue were loaded and sealed by the shippers. It is uncontroverted that the carrier had no opportunity to see the goods, to verify the condition or quantity of the goods, or otherwise inspect the shipment. The trial court *did* find, however, that both VIANESSA and

EL PIRATA failed to provide shipper's instructions to BELIZE TRADING, and that the documents supplied to the carrier were contradictory and incomplete, and these findings were not disputed on appeal (Pet.App. C).

Recognizing the difficulty to carriers in such situations, COGSA provided, at Section 3(3)(c), 46 USC § 1303(3)(c), that a carrier is *not* required

> to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, **or which he has had no reasonable means of checking.** (Emphasis added)

This section of COGSA has been explicitly recognized to provide carriers with the means to protect themselves in case of doubt or lack of opportunity to inspect. *Woodhouse, Drake & Carey, Inc. v. M/V Righteous*, 710 F.2d 1523, 1984 AMC 479 (11th Cir. 1983); *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 1975 AMC 395 (9th Cir.1974). In *Woodhouse*, the Eleventh Circuit cited with approval *Portland Fish*, which held, *inter alia*, that under 46 USC §1303 (3) (c):

> COGSA expressly provides the means by which carriers, in case of doubt concerning the goods, may protect themselves and avoid liability if they choose to do so.

Portland Fish, at 633.

Neither EL PIRATA nor VIANESSA contests that their containers were loaded and sealed by the shipper, and that the containers were delivered in sealed condition to the carrier. The sealed containers prevented the carrier from a "reasonable means of checking" the number and/or

quantity of goods and, thus, the carrier was brought within the purview of the §1303(3)(c) proviso.

Section 1303(3)(c) has also been used—as in the aforesaid cases—to create estoppel against a carrier who *does* make statements in the bill of lading. Recent cases have illustrated the problem this causes for the carrier. In *Continental Distributing Co. v. M/V "Sealand Commitment"*, 1992 AMC 1743 (S.D.N.Y. 1992), the cargo owner obtained summary judgment against the carrier for alleged pilferage from a shipper loaded and sealed container. The bill of lading listed the number of packages and weight given by the shipper. The court held that by listing the number of packages as stated by the shipper, the carrier represents that it has no reasonable ground for suspecting a variance in the number of packages actually received, and that it has reasonable opportunity to check the number of packages. *Id.*, at 1747. The court also specifically found that attempted reservations such as "said to contain" or "shipper's count" cannot be relied upon to escape liability, where the carrier's conduct amounts to a representation *Id.* at 1748. *See also, Judy-Philippine, Inc. v. S/S "Verazano Bridge"*, 781 F.Supp. 253, 1992 AMC 1773 (S.D.N.Y. 1991) *Samsung America, Inc. v. M/T "Fort Producer"*, 798 F.Supp. 184, 1993 AMC 29 (S.D.N.Y. 1992).

Thus, the decision of the Eleventh Circuit places the carrier in an untenable "Catch 22" position. If the carrier receives a packing list with the sealed container, then under the Eleventh Circuit's decision the bill of lading is absolutely required to reflect the number of packages set forth by the shipper, *even if* the carrier has no opportunity to check, or has reason to believe the count is wrong. However, by listing the shipper's count on the bill of lading, then the carrier can be held liable for variances from that count.

Such a situation is not mere speculation. In this case, one shipper (VIANESSA) provided a loaded and sealed container. VIANESSA also prepared an invoice which showed 481 cartons inside the container. Under the Eleventh Circuit's decision, BELIZE TRADING was required to list 481 cartons on the bill of lading. However, VIANESSA conceded at trial that the carton count was wrong, and that actually only 431 cartons were loaded. Conceivably, a consignee armed with the bill of lading and the invoice could claim a loss of 50 nonexistent cartons, and establish a *prima facie* case based on the documentation under the *Continental Distributing* line of cases. Under the Eleventh Circuit's decision, then, an unsuspecting carrier could face liability for nonexistent cargo, based solely on documentation mandated by the Eleventh Circuit's opinion.

Moreover, it was uncontroverted that discrepancies in the documents could lead to problems with Customs officials in Belize, including seizure of the container and all of its contents. El Pirata, the consignee, conceded that Belize Customs could seize the shipment for misdescription.

In this case, there were discrepancies and ambiguities in the documents. It is clear that of the three dock receipts issued by HYDE for EL PIRATA cargo, only one contained a carton count. Moreover, the U.S. Customs in-bond shipment forms received from EL PIRATA's shipper were incomplete because not all goods were shipped in bond. While HYDE had the invoice and was able to prepare the Shipper's Export Declaration form, the invoice listed the number of *pieces* in the shipment, not the number of cartons.

With regard to VIANESSA, all goods were shipped in bond and, thus, were the subject of U.S. Customs forms.

The forms for this shipment show 481 cartons; a handwritten note on one form showed reduction on one item from 341 cartons to 291 cartons. The invoice lists 340 units of that unit shipped, although the numerical totals on the invoice add up to only 290 units. VIANESSA *admitted* at trial that the piece counts shown in the invoice and dock receipts were incorrect and inaccurate. These documents clearly present the type of contradictory information which the carrier sought to avoid in preparing the bills of lading.

HYDE acted in accordance with the provisions of Section 3(3) of COGSA in listing the number of containers as the number of packages in the bill of lading, and the Eleventh Circuit's holding that it "failed to adhere to the law" in doing so improperly renders COGSA Section 3(3)(c) null and void to the extreme prejudice of ocean carriers.

II.

THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI BECAUSE THE ELEVENTH CIRCUIT'S RULING THAT THE TERMS OF AN OCEAN BILL OF LADING ARE NOT EFFECTIVE UNTIL ACCEPTED BY THE SHIPPER OR CONSIGNEE CONFLICTS WITH ESTABLISHED MARITIME PRECEDENT

The Eleventh Circuit Court of Appeals also ruled that the bills of lading were not "contracts" because they had not been "accepted" by either the shipper or the consignee (Pet.App. A). Implicit in this legal ruling was the Panel's factual finding that the bills of lading were issued after the vessel left port and the loss had occurred. **This factual finding is unsupported by the record. The bills of lading were prepared on the day of loading (October 8, 1987), as conceded by Appellees.** ***See,***

Page 4 of the brief that EL PIRATA filed before the Eleventh Circuit (Pet.App. I). There was *no* evidence to show that the bills were prepared after the vessel left port or after the occurrence of the loss.

In any event, a bill of lading constitutes a contract between the carrier and the shipper/consignee. Gilmore & Black, *The Law of Admiralty* §3-1 (2d Ed. 1975). It has long been accepted that the usual terms and conditions of a bill of lading control the relations between the parties, *even where* the bill of lading has been issued long after a loss. In *Luchenback Steamship Co., Inc. v. American Mills Co.*, 24 F.2d 704, 1928 AMC 558 (5th Cir.1928), cargo was destroyed by fire prior to the issuance of a bill of lading. The Court held that the usual terms and conditions as set forth in the bill of lading controlled the contract between the parties. Bills of lading issued after a loss are deemed to be fully valid, even where there are no prior dealings between the parties. *Baker Oil Tools, Inc. v. Delta Steamship Lines, Inc.*, 387 F.Supp. 617, 1975 AMC 238 (S.D.Tex. 1974), *aff'd.*, 562 F.2d 938 (5th Cir. 1977); *Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714, 1991 AMC 75 (4th Cir. 1990); *New Hampshire Ins. Co. v. Seaboard Marine Ltd.*, 1992 AMC 279 (S.D.Fla. 1991), *aff'd.*, 946 F.2d 1547 (11th Cir. 1991); *Mack Trucks, Inc. v. Farrell Lines, Inc.*, 1990 AMC 2669 (S.D.N.Y. 1990); *Mediterranean Marine Lines, Inc. v. John T. Clark & Son*, 485 F. Supp. 1330, 1980 AMC 1731 (D. Md. 1980).

It is impossible to reconcile the Eleventh Circuit's decision that the bill of lading must be accepted by the shipper/consignee before it can become a contract, with substantial precedent that a bill of lading can be binding even if issued after the loss.

The rule of *Luchenback* and its progeny meshes well with the realities of commercial shipping. Bills of lading

are frequently prepared near or at the time of sailing, depending in large degree as to when merchandise is received. It is not unusual for a carrier to receive containers for shipment only hours before sailing. In such circumstances, it would be virtually impossible to ensure "acceptance" of the bill of lading from the shipper/consignee prior to sailing. The far better and more realistic law is the precedent of *Luchenback*, which accepts the standard bill of lading as the implied contract between the parties. Indeed, a representative of the shipper of the EL PIRATA cargo testified that its copy of the bill of lading was received in the normal and customary time.

Neither EL PIRATA nor VIANESSA should be heard to complain about the method of preparation of the bills of lading. Both were free to prepare bills of lading themselves, to hire a freight forwarder to do so, or even to prepare written "shipper's instructions" to the carrier. Both could also have declared a higher value for carriage at the *ad valorem* rate set forth in the tariff. El PIRATA and VIANESSA chose to do none of these things, but simply left the method of preparation up to HYDE.

The Eleventh Circuit's decision that a bill of lading does not constitute a contract between the shipper/consignee and the carrier until expressly "accepted" by the shipper/consignee conflicts with long established maritime law, grossly prejudices ocean carriers and will seriously impede the free and expeditious flow of ocean commerce.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

William B. Milliken, Esq.
HAYDEN AND MILLIKEN, P.A.
5915 Ponce de Leon Boulevard
Coral Gables, Florida 33146
Telephone: (305) 662-1523

Attorneys for Petitioners

November 10, 1993

Appendix

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APPENDIX A

Nos. 91-5616, 91-5842.

United States Court of Appeals,
Eleventh Circuit.

June 21, 1993.

In re The Complaint of BELIZE TRADING, LTD. for Exoneration from or Limitation of Liability as the Owner of the M/V HYBUR TRADER, Petitioner-Appellee,

v.

SUN INSURANCE COMPANY OF NEW YORK, et al.,
Claimants,

El Pirata Del Caribe, S.A., Vianessa, Inc. and Tripoli Importadora, C.A. f/u/b/o Insurance Company of North America, Claimants-Appellants.

HERSHEY FOODS CORP.,
Rorer International Corp., Plaintiffs,

Vianessa, Inc., Tripoli Importadora, C.A.,
Plaintiffs-Appellants,

v.

HYBUR LIMITED, Defendant-Appellee.

In re The Complaint of BELIZE TRADING, LTD. for Exoneration from or Limitation of Liability as the Owner of the M/V HYBUR TRADER, Petitioner-Appellee,

v.

SUN INSURANCE COMPANY OF NEW YORK, et al., Claimants,

Vianessa, Inc. and Tripoli Importadora, C.A. f/u/b/o Insurance Company of North America, Claimants-Appellants.

HERSHEY FOODS CORP., Rorer International Corp., Plaintiffs,

Vianessa, Inc., Tripoli Importadora, C.A., Plaintiffs-Appellants,

v.

HYBUR LIMITED, Defendant-Appellee.

Carrier brought proceeding seeking exoneration from liability for cargo lost at sea during hurricane. Shippers counterclaimed for value of cargo lost. The United States District Court for the Southern District of Florida, Nos. 88-420-Civ-FAM, 88-1805-Civ-EBD, Federico A. Moreno, J., limited shippers' recovery to $500 per container into which cargo was packed and sealed. Shippers appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) bills of lading were not contracts since neither shippers nor consignees accepted any of the bills and could not have accepted them because they were given no opportunity to do so, and (2) COGSA required carrier to issue bills of lading showing number of cartons shippers

had indicated in invoices and packing lists, and not number of containers into which cartons were packed.

Vacated and remanded.

1. Shipping —140(1)

Bills of lading were not "contracts" so that descriptions of packages and goods that carrier inserted in bills of ladings did not control dispute arising between shippers and carrier after goods were lost at sea, where face of each bill stated that neither shipper nor consignee was bound by any of bill's provisions until bill was accepted and neither shippers nor their consignees accepted any of the bills, and they could not have accepted them because they were given no opportunity to do so. 46 App.U.S.C.A. §§ 183-185; Carriage of Goods by Sea Act, § 4(5), 46 App.U.S.C.A. §§ 1300 et seq., 1304(5).

See publication Words and Phrases for other judicial constructions and definitions.

2. Shipping —134, 140(2)

Carriage of Goods by Sea Act (COGSA) precluded carrier from describing cargos by number of containers into which shippers had packed and sealed cargo before sending them to carrier's dock, and instead, carrier was required to issue bills of lading showing, among other things, number of cartons shippers had indicated in packing lists and invoices; thus, carrier's liability was not limited to $500 for each container lost, but rather was limited to $500 for each carton as disclosed in shippers' packing lists and invoices. 46 App.U.S.C.A. §§ 183-185; Carriage of Goods by Sea Act, §§ 1(b), 3(3), 4(5), 13, 46 App.U.S.C.A. §§ 1300 et seq., 1301(b), 1303(3), 1304(5), 1312.

Appeals from the United States District Court for the Southern District of Florida

Before JTOFLAT, Chief Judge,
EDMONDSON, Circuit Judge, and
MORGAN, Senior Circuit Judge.

TJOFLAT, Chief Judge:

I.

In these consolidated appeals, two shippers, Precision Trading Corporation (Precision) and Vianessa, Inc. (Vianessa), arranged for a carrier, Belize Trading, Ltd. (Belize Trading), to transport cargo under bills of lading on board the vessel *Hybur Trader* from Miami, Florida to Belize. After packing and sealing the cargo in containers the carrier had provided, the shippers sent the containers to the carrier's dock in Miami and gave Belize Trading documents describing the containers' contents.[1] The

[1]Precision gave Belize Trading a packing list for each of the three containers it shipped. The lists indicated the following:

1 40-foot container #INBU-4112440 containing 791 cartons,
1 40-foot container #CTIU-4843385 containing 384 cartons,
1 40-foot container #INAU-2914481 containing 755 cartons.

Precision also gave Belize Trading copies of the invoices it sent to its consignee. These invoices, the identifying numbers of which appeared on the packing lists, indicated the quantity, brands, model numbers, and prices of the items of cargo packed in the containers.

Vianessa shipped its cargo in one container, and gave Belize copies of the invoices it sent to its consignee. The invoices indicated that the container had been packed with

30 cartons Silver Crown 14" color televisions,
25 cartons Silver Crown 19" color televisions,

(Footnote continued on next page)

parties understood that Belize Trading, in accordance with industry custom, would prepare and issue bills of lading upon stowing the shipments aboard the *Hybur Trader*. Belize Trading, however, did not issue the bills at that time; rather, it issued them after the *Hybur Trader* had left port and part of its cargo, including Vianessa's container and two of Precision's three containers, had been lost at sea during a hurricane.

Following the cargo loss, Belize Trading brought a proceeding in the United States District Court for the Southern District of Florida seeking exoneration from liability under 46 U.S.C.App. §§ 183-185 (1988). Precision's consignee, El Pirata del Caribe (El Pirata), and Vianessa appeared and counterclaimed for the value of the cargo they had lost. El Pirata sought $170,160.43 in damages, and Vianessa sought $38,000 in damages. In response, Belize Trading contended that the three containers involved in the loss were the relevant "packages" within the meaning of the $500 per package limit of liability provided under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.App. § 1304(5) (1988), and asked the court to limit El Pirata's recovery to $1,000, and Vianessa's to $500. According to Belize Trading, the containers, rather than the cartons within the containers, should be treated as packages because the bills of lading, under the "Description of Packages and Goods," only indicated the number of containers, not the number of cartons.[2]

(Footnote continued from previous page)

80 cartons Silver Crown monos,
5 cartons Silver Crown stereos,
240 cartons Silver Crown 12" black and white televisions,
1 carton spare parts free of charge.

[2]According to the "Description of Packages and Goods" in Precision's bill of lading, on which El Pirata based its claim, the shipment consisted ot "three forty-foot containers s.t.c. [said to contain] electronic

(Footnote continued on next page)

El Pirata and Vianessa asked the district court to disregard the bills' "Description of Packages and Goods," to interpret the bills as having described the number of cartons the shippers had disclosed to Belize Trading in the packing lists and invoices, and to treat the number of cartons as the number of COGSA packages. El Pirata and Vianessa would thus be entitled to recover up to $500 per carton, rather than $500 per container.

The district court refused to modify the bills of lading as El Pirata and Vianessa requested. In the court's view, the language Belize Trading had used to describe the packages and goods being shipped constituted a material part of a formal written agreement, and, as such, could not be substituted with the description of the goods appearing in the packing lists and invoices. The district court therefore held, at the conclusion of a bench trial, that Belize Trading's liability to El Pirata and Vianessa was limited to $500 per container, and entered judgment accordingly. Vianessa and El Pirata now appeal.

We conclude that the district court erred in finding that the descriptions of the packages and goods in the respective bills of lading control this dispute. As we explain below, the descriptions were merely the carrier's unilateral and self-serving statements of the shippers' cargos. Instead of these descriptions, COGSA required the carrier to indicate the number of cartons that made up the cargos as declared by the shippers in the packing lists and invoices they had furnished the carrier.

(Footnote continued from previous page)
equipment." According to Vianessa's bill of lading, the shipment consisted of "one twenty-foot container s.t.c. color television sets and radio cassette recorders."

II.

[1] We need not tarry long in explaining why the descriptions of packages and goods Belize Trading inserted in the bills of lading do not control this dispute. First, the face of each bill states that neither the shipper nor the consignee is to be bound by any of the bill's provisions until the bill is accepted.[3] Here, neither the shippers nor their consignees accepted any of the bills; they could not have accepted them because they were given no opportunity to do so. Contrary to the district court's holding, therefore, the bills are not contracts.

[2] Second, COGSA, which clearly applies in this case,[4] precluded Belize Trading from describing the cargos as it did. COGSA required Belize Trading to issue bills of lading after receiving the cargos showing, among other things, the number of cartons the shippers had indicated.[5] Here, Precision and Vianessa provided Belize Trading with invoices, and, in Precision's case, packing lists as well, that

---

[3]This statement, which appears on each of the bills of lading, reads as follows: "IN ACCEPTING THIS BILL OF LADING the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed or stamped on the front or back hereof, any local customs or privileges to the contrary notwithstanding."

[4]COGSA applies to "all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C.App. § 1312 (1988). Such contracts are those that, as here, are "covered by a bill of lading or any similar document of title. . . ." 46 U.S.C.App. § 1301(b) (1988).

[5]Section 1303(3) of COGSA provides that

> [a]fter receiving the goods into his charge the carrier . . . shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—
>
> . . . .

(Footnote continued on next page)

indicated the number of cartons placed in the containers. Had Belize Trading followed COGSA's dictates, there would be no room for dispute. We cannot allow Belize Trading to profit from its failure to adhere to the law. We therefore construe the bills of lading as having been issued in conformity with COGSA and as reflecting the number of packages the shippers indicated in packing lists and invoices to Belize Trading.[6]

III.

For the foregoing reasons, we find that the district court erred in limiting Belize Trading's liability to $500 per container. Accordingly, we VACATE the district court's judgment and REMAND for further proceedings. On remand, the district court must determine the value of the cartons in the three lost containers, and assess Belize Trading's liability to El Pirata and Vianessa accordingly.

(Footnote continued from previous page)

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

46 U.S.C.App. § 1303(3) (1988).

[6]*Hayes-Leger Associates, Inc. v. M/V Oriental Knight*, 765 F.2d 1076 (11th Cir.1985), on which the district court relies, is not to the contrary. In that case, we held that a container is the "package" for purposes of applying COGSA's $500 limit of liability when the shipper and carrier agreed that the bill of lading would indicate only the number of containers, and not the number of packages, being shipped. That case, however, is inapposite to this controversy. In *Hayes-Leger*, the bill of lading reflected precisely what the shipper disclosed to the carrier. The issue before the court was whether, notwithstanding this disclosure, the container should be considered the "package" for limitation of liability purposes. *Id.* at 1080. The case at hand differs significantly. Here, the question is what the bills of lading should have described, given that Belize Trading failed to record the number of cartons the shippers' packing lists and invoices had disclosed to the carrier.

VACATED and REMANDED.

APPENDIX B

[FILED AUG 16, 1993]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5616

IN RE: THE COMPLAINT OF BELIZE TRADING, LTD. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF THE M/V HYBUR TRADER,

Petitioner-Appellee,

versus

SUN INSURANCE COMPANY OF NEW YORK, et al.,

Claimants,

EL PIRATA DEL CARIBE, S.A., VIANESSA, INC. and TRIPOLI IMPORTADORA, C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA,

Claimants-Appellants.

HERSHEY FOODS CORP.,
RORER INTERNATIONAL CORP.,

Plaintiffs,

VIANESSA, INC., TRIPOLI IMPORTADORA, C.A.,

Plaintiffs-Appellants,

versus

HYBUR LIMITED,

Defendant-Appellee.

91-5842

IN RE: THE COMPLAINT OF BELIZE TRADING, LTD. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF THE M/V HYBUR TRADER,

Petitioner-Appellee,

versus

SUN INSURANCE COMPANY OF NEW YORK, et al.,

Claimants,

VIANESSA, INC. and TRIPOLI IMPORTADORA, C.A f/u/b/o INSURANCE COMPANY OF NORTH AMERICA,

Claimants-Appellants.

HERSHEY FOODS CORP.,
RORER INTERNATIONAL CORP.,

Plaintiffs,

VIANESSA, INC., TRIPOLI IMPORTADORA, C.A.,

Plaintiffs-Appellants,

versus

HYBUR LIMITED,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [ILLEGIBLE]
UNITED STATES CIRCUIT JUDGE

August 16, 1993

William Russell Boeringer
Hayden & Milliken, PA
5915 Ponce de Leon Boulevard, Suite 63
Miami, FL 33146

RE: 91-5616 Belize Trading v. Sun Insurance Co.
DIST. CT. NO. - 88-00420 CIV-FAM

Other addressees: Gerhardt A. Schreiber
William E. Cassidy
T. G. Cheleotis
Hon. Federico A. Moreno

APPENDIX C

[FILED JUN 24, 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-0420-CIV-MORENO

IN RE: THE COMPLAINT OF BELIZE TRADING, LTD. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF THE M/V HYBUR TRADER,

Petitioner,

VIANESSA, INC., TRIPOLI IMPORTADORA C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA, and EL PIRATA DEL CARIBE, S.A.,

Claimants.

MEMORANDUM OPINION AND ORDER OF FINAL JUDGMENT

In October, 1987, the vessel "Hybur Trader" left Miami, Florida bound for Belize, Central America. During the voyage, cargo belonging to claimants Vianessa, Inc. and El Pirata del Caribe, S.A. was lost. Petitioner Belize Trading, Ltd., owner of the Hybur Trader, filed this action for exoneration and limitation of liability. Prior to trial, petitioner Belize withdrew its petition.

A bench trial on the issues of liability and damages included live testimony, documents, exhibits and records to support the parties' positions. The Court has considered all

of the evidence as well as the proposed findings and legal briefs filed by the parties.

FINDINGS OF FACT

1. Petitioner, Belize Trading, Ltd. is a Cayman Island corporation, and the owner of the Motor Vessel "Hybur Trader." The vessel was operated by Hybur Ltd., which operated a liner service between Miami, and Belize, Central America. Hybur is a common carrier of goods for hire by sea. Petitioner and Hybur were both represented by their agent in Miami, Hyde Shipping Corporation.

2. Claimant Vianessa, Inc., a Florida corporation, was the shipper of certain goods aboard the same vessel and voyage, under Bill of Lading number 43. The consignee of goods shipped by Vianessa was Tripoli Importadora S.A., a foreign corporation with its principal place of business in Belize, Central America. The claims of Tripoli and Vianessa were paid by the Insurance Company of North America. The monies paid by INA were retained by Vianessa.

3. Claimant El Pirata del Caribe, S.A., is a foreign corporation with its principal place of business in Chetumal, Mexico. El Pirata was the consignee and owner of certain goods which were shipped aboard the Hybur Trader under Bill of Lading number 127, dated October 8, 1987. Those certain goods were shipped from Miami to El Pirata by Precision Trading Corporation.

4. On October 8, 1987, the Hybur Trader departed Miami bound for Belize. During the voyage, which was never completed, the vessel encountered inclement weather and a number of cargo containers were lost, including one container belonging to claimant Vianessa, and two containers belonging to claimant El Pirata.

5. Vianessa Bill of Lading No. 43 indicates a single container, and makes reference to Dock Receipt No. 8631 and four WDEXs, the Customs Withdrawal Forms.

6. Hyde Shipping supplied the container to Vianessa. Vianessa loaded the container which was then transported by Olympic Transport to Hyde Shipping to be loaded aboard the Hybur Trader.

7. Dock receipt 8631, which was prepared by Hyde Shipping, indicates that the container was said to contain 481 cartons.

8. The WDEXs for the Vianessa cargo indicate a total of 431 cartons. Handwritten notes on WDEX No. 04747831 indicate that the number of goods was changed from 341 to 291 cartons because the container provided by Hyde could not contain 341 cartons.

9. Both Vianessa's invoice and former president, Mr. Ashok Kitchloo, acknowledge the discrepancy between the number of cartons listed, 340, and the number of pieces shipped, 290.

10. Vianessa and Hyde had done business together prior to the Hybur Trader's October 8, 1987 voyage. The bills of lading issued in those previous transactions were prepared by freight forwarders paid by Vianessa.

11. The Court finds that Hyde had Vianessa's invoice and the four WDEX forms in its possession at the time it issued Bill of Lading No. 43 and Dock Receipt 8631.

12. Precision's Bill of Lading No. 127 indicates three containers. The containers were provided to Precision by Hybur. Precision packed the containers which were then transported to Hyde for shipping. Bill of Lading No. 127

references Dock Receipts 8612, 8613, and 8614 and five WDEX forms.

13. Hybur and Precision had done business together prior to the October 8, 1987 Hybur Trader voyage.

14. Bill of Lading No. 127 does not indicate the number of cartons shipped, in contrast with the previous shipments made by Hybur on behalf of El Pirata. Nor do the WDEX forms identify completely the contents of the containers.

15. Mr. Benito Torres, traffic manager for Hyde, testified that it was Hyde's usual practice to receive the packing list from either the transport company, which was arranged for and paid for by Hyde, or the shipper.

16. Mr. Torres further testified that where no freight forwarder was involved, it was Hyde's usual practice to prepare the bill of lading and the Shipper's Export Declaration (SED) from the packing lists and the invoices supplied by the shipper.

17. Precision's packing lists were the only documents in Hyde's possession indicating any specific number of cartons.

18. Hyde Dock Receipt 8614, prepared by Hyde, notes that one of the Precision containers was said to contain 791 cartons.

19. The Court finds that Hyde received copies of Precision's packing lists and invoices upon receipt of the containers.

20. Neither Vianessa nor El Pirata provided the carrier with shipper's instructions or hired a freight forwarder to prepare the bills of lading.

21. The Court finds that Hybur did not assume the duties of a freight forwarder for either claimant.

CONCLUSIONS OF LAW

The Carriage of Goods by Sea Act establishes the regulatory framework applicable to ocean carriage. 46 U.S.C. § 1300 *et seq*. COGSA applies to "every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade . . ." 46 U.S.C. § 1300. The principles of COGSA are applicable to the instant action.

Under COGSA, a ship owner has a duty to use due care to furnish a sea worth vessel. If he does so, he will not be held liable for navigational errors of the crew or master. COGSA also mandates that a ship owner properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. A carrier may therefore be held liable for fault in handling or caring for its cargo even after it has fulfilled its duty to provide a sea worthy vessel. However, a carrier may be entirely exempt from liability under COGSA for losses due to an act or omission of the shipper or his agent, or insufficiency or inadequacies of marks. 46 U.S.C. § 1304(2)(i) and (o).

COGSA further provides for a limitation of the carrier's liability to $500.00 per package unless a higher value is declared by the shipper and inserted into the bill of lading. 46 U.S.C. § 1304(5). The Court finds that no higher value was specifically declared in the subject bills of lading.

The Vianessa Bill of Lading no. 43 plainly lists only a single container. The Precision Bill of Lading no. 127 indicates three containers.[1] A container may constitute a "package" under COGSA where the bill of lading lists the number of containers as the number of packages, and fails to disclose the number of cartons or packages within the containers. *Hayes-Leger Associates, Inc. v. M/V Oriental Knight*, 765 F.2d 1076 (11th Cir. 1985). On their face, the subject bills of lading conform to the requirements established in *Hayes-Leger*, in that they list the containers as packages, and fail to disclose the number of cartons in the containers. Petitioner has therefore stated a *prima facie* case that it is entitled to the limitation.

Petitioner asserts that Bills of Lading Nos. 43 and 127, issued by Hybur, represent the complete contracts of carriage between claimants and petitioner Belize. Claimants counter that the bills of lading are not dispositive, arguing that (1) petitioner is estopped from asserting the limitation because there is evidence that Belize had documents available to it which disclosed the number of cartons; (2) Belize is estopped because of the course of conduct between the parties; and (3) Belize committed fraud in preparing the bills of lading after the loss. None of these arguments are persuasive.

Both claimants assert that petitioner had access to documents which contained information regarding the number of cartons, but failed to incorporate such information into the bills of lading at the time of preparation. While the Court has found that petitioner did in fact possess such information, this fact is not controlling. fraud in preparing the bills of lading after the loss. None of these arguments are persuasive.

---

[1]Only two of the packages were lost and are at issue here.

Both claimants assert that petitioner had access to documents which contained information regarding the number of cartons, but failed to incorporate such information into the bills of lading at the time of preparation. While the Court has found that petitioner did in fact possess such information, this fact is not controlling.

In order for this Court to consider the additional information contained in the invoices, WDEX forms and other documents, claimants must establish that the language of the bills of lading is ambiguous. Furthermore, the documents claimants contend provide petitioner a basis for determining the of number of cartons being shipped by either claimant were either incomplete, in El Pirata's case, or hopelessly irreconcilable, in Vianessa's case.

It is well settled that parol evidence may not be used to contradict the terms of an unambiguous written contract. *Peterson v. Lexington Insurance Co.*, 753 F.2d 1016 (11th Cir. 1985). The bill of lading is a contract of carriage and its terms cannot be varied by parol evidence. *See, e.g., Internatio, Inc. v. M/V Yinka Folawiyo*, 480 F.Supp. 1245, 1252 (E.D. Pa. 1979). Neither Vianessa's nor El Pirata's bill of lading is ambiguous. Parol evidence is therefore inadmissible to change the terms of the bills.[3]

Claimants next argue that because of past dealings between Hybur and claimants, Belize is estopped from claiming the $500 package limitation because the bills of lading at issue in this action were prepared in

[3]The additional documents presented during trial raise conflicts as to the exact number of cartons actually listed and shipped by claimants. The Court therefore, need not determine the conflict issues raised by the invoices, WDEX forms, SEDs and packing lists.

contravention of the parties prior dealings.[4] The Court finds that the previous dealings between the parties do not provide a basis for this Court to hold petitioner liable to claimants by estoppel.

In order to establish estoppel against petitioner, claimants must show that Belize (a) used words, acts, conduct or silence causing claimants to believe in the existence of a certain state of things, (b) used the conduct or silence negligently or recklessly, and (c) the claimants suffered detrimental reliance thereby. *Highlands Insurance Co. v. Trinidad & Tobacco (BWIA International) Airways Corp.*, 739 F.2d 536, 540 (11th Cir. 1984).

In the previous dealings between Vianessa and Hybur, the bills of lading were prepared by freight forwarders. Vianessa did not employ a freight forwarder to prepare its bill of lading for the October 8, 1987 Hybur Trader voyage, and presented no evidence regarding any prior transaction in which Hyde prepared a bill of lading on behalf of Vianessa.

El Pirata's estoppel claim is equally tenuous. Only one of the previous bills of lading submitted by El Pirata, as evidence of a prior course of conduct between the parties, is not relevant to the instant conflict, as Precision is not the shipper. That previous bill of lading prepared by Hyde which reflects El Pirata as the consignee and Precision as the shipper. This Court however is reluctant to find that one previous bill of lading is sufficient to establish a course of conduct between the parties, especially in light of the fact that El Pirata had received shipments transported by

---

[4]Claimants however have cited no legal authority supporting their position which would require the carrier to include a stated number of cartons in the bill of lading, where a container was loaded and sealed by the shipper and the carrier had no first hand knowledge of the contents.

Hybur, from various parties employing differing methods in shipping such goods.

The Court concludes that any prior dealings between the parties are extremely limited, thus failing to establish a course of conduct sufficient to cause either claimant to believe in the existence of a certain state of things. Because claimants cannot meet the first prong of the three-part test, estoppel is not applicable against petitioner by either claimant.

Finally, claimants have alleged that the petitioner is guilty of fraud in that the bills of lading were prepared after the loss of the cargo. The Court finds insufficient evidence to support any claim of fraud.

Based on the foregoing, the Court finds that the $500 per package limitations is applicable to each of claimant's containers. Petitioner is liable to Vianessa in the amount of $500 and to El Pirata in the amount of $1000. Petitioner is not entitled to collect any unpaid freight charges from either claimant. Judgment will be entered accordingly.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of June, 1991.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:

William R. Boehringer, Esq.
Gerhardt A. Schreiber
William E. Cassidy, Esq.

CLOSED CIVIL CASE

APPENDIX D

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

IN ADMIRALTY

Case No. 88-0420-CIV-MORENO

IN RE: THE COMPLAINT OF BELIZE TRADING, LTD. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF THE M/V HYBUR TRADER

Plaintiff,

vs.

VIANESSA, INC., TRIPOLI IMPORTADORA C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA, and EL PIRATA DEL CARIBE, S.A.,

Defendants

NOTICE OF APPEAL

Notice is hereby given that El Pirata del Caribe, S.A, defendant, above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in this action on the 24th day of June, 1991.

Dated this 16 day of July, 1991.

SCHREIBER, RODON-ALVAREZ, P.A.
Attorney for El Pirata del Caribe, S.A.
890 South Dixie Highway
Coral Gables, Florida 33146
Tel: (305) 662-2629

By: /s/ G.A. SCHREIBER
Gerhardt A. Schreiber
Florida Bar No. 194655

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0420-CIV-MORENO
88-1805-CIV-MORENO

IN RE: THE COMPLAINT OF BELIZE TRADING, LTD. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF THE M/V HYBUR TRADER,

Petitioner,

VIANESSA, INC. and TRIPOLI IMPORTADORA C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA, and EL PIRATA DEL CARIBE, S.A.,

Defendants/Claimants.

NOTICE OF APPEAL

Notice is hereby given that the Defendants/Claimants, VIANESSA, INC. and TRIPOLI IMPORTADORA C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA, above named, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Final Judgment entered in this action on the 24th day of June, 1991.

Dated this 19th day of July, 1991.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to William R. Boeringer, Esquire, Hayden & Milliken, P.A., Suite 63, 5915 Ponde De Leon Blvd., Coral Gables, Florida 33146, and Gerhardt A. Schreiber, Esquire, Schreiber, Rodon-Alvarez, P.A. 890

South Dixie Highway, Miami, Florida 33146 on this 19th day of July, 1991.

LAW OFFICES OF WILLIAM E. CASSIDY
Attorneys for Defendants/Claimants
8370 West Flagler Street
Suite 252
Miami, Florida 33144
FLA BAR NO. 266477

BY: /s/ William B. Cassidy
WILLIAM B. CASSIDY

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 91-5616
CONSOLIDATED WITH
CASE NO. 91-5842

IN RE: THE COMPLAINT OF BELIZE TRADING, LTD. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF THE M/V HYBUR TRADER,

Petitioner / Appellee,

vs.

EL PIRATA DEL CARIBE, S.A. VIANESSA, INC. and TRIPOLI IMPORTADORA C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA,

Defendants / Claimants, Appellants.

VIANESSA, INC. and TRIPOLI IMPORTADORA C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA,

Plaintiffs / Appellants,

vs.

HYBUR LIMITED,

Defendant / Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0420 CIV-MORENO
& 88-1805 CIV-MORENO

SUGGESTION OF REHEARING EN BANC

William R. Boeringer, Esq.
HAYDEN AND MILLIKEN, P.A.
Attorneys for Appellant
5915 Ponce de Leon Blvd.
Suite 63
Miami, Florida 33146
(305) 662-1523

CERTIFICATE OF INTERESTED PERSONS

BELIZE TRADING, LTD.
WILLILAM R. BOERINGER, ESQ.
WILLIAM E. CASSIDY, ESQ.
EL PIRATA DEL CARIBE, S.A.
HAYDEN and MILLIKEN, P.A.
HYBUR, LTD.
INSURANCE COMPANY OF NORTH AMERICA
JUDGE FEDERICO MORENO
GERHARDT A. SCHREIBER, ESQ.
TRIPOLI IMPORTADORA, S.A.
VIANESSA, INC.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Luchenback Steamship Co., Inc. v. American Mills Co., 24 F.2d 704, 1928 AMC 558 (5th Cir.1928)

Woodhouse, Drake & Carey, Inc. v. M/V Righteous, 710 F.2d 1523, 1984 AMC 479 (11th Cir. 1983)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

The decision of the Panel conflicts with established maritime precedent and may subject ocean carriers to unwarranted liability.

HAYDEN AND MILLIKEN, P.A.
5915 Ponce de Leon Blvd.
Suite 63
Miami, Florida 33146
(305) 662-1523

By: /s/ [ILLEGIBLE]
William R. Boeringer, Esq.
Attorney for Appellant
Florida Bar No. 347191

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STATEMENT OF ISSUES

THIS COURT SHOULD GRANT **EN BANC** RECONSIDERATION BECAUSE THE PANEL'S RULING THAT THE TERMS OF AN OCEAN BILL OF LADING ARE NOT EFFECTIVE UNTIL ACCEPTED BY THE SHIPPER OR CONSIGNEE CONFLICTS WITH ESTABLISHED MARITIME PRECEDENT.

THIS COURT SHOULD GRANT **EN BANC** RECONSIDERATION BECAUSE OF INHERENT CONFLICTS IN THE LAW RESULTING FROM THE PANEL'S RULING THAT COGSA REQUIRES ENUMERATION OF THE NUMBER OF CARTONS WITHIN A CONTAINER LOADED AND SEALED BY THE SHIPPER.

STATEMENT OF FACTS AND OF THE CASE

(Note: References to Plaintiff's Exhibits are P.Ex; to El Pirata's Exhibits are EP.Ex.; to Vianessa's Exhibits are V.Ex.)

A. The Factual History

BELIZE TRADING, LTD. ("BELIZE TRADING"), the Appellee, is a Cayman Island based company which, at all times material, was the owner of the motor vessel "HYBUR TRADER". Pursuant to agreement, the ship was operated by Hybur, Ltd. The ship operated as a common carrier by water for hire, engaged in regular liner service between Miami, Florida and, *inter alia*, Belize. Agency services were provided to the ship and to Hybur, Ltd. by Hyde Shipping, based in Miami, Florida.

The "HYBUR TRADER" was a container vessel, and did not carry break bulk cargo.

EL PIRATA DEL CARIBE, S.A. ("EL PIRATA"), an Appellant herein, was the consignee and owner of certain goods to be shipped on the vessel on October 8, 1987. The shipper of EL PIRATA's goods was Precision Trading Corporation, under Bill of Lading No. 127 (P.Ex.3). VIANESSA, INC. ("VIANESSA") was also a shipper of goods, under Bill of Lading No. 43 (P.Ex.4). VIANESSA's consignee was Tripoli Importadora, S.A.

With regard to EL PIRATA's goods, Hyde Shipping booked the cargo for sailing on the "HYBUR TRADER". At the shipper's request, Hyde Shipping contacted an independent trucker to deliver these trailers to Precision Trading. At Precision Trading's warehouse, the trailers were stuffed and sealed by Precision Trading (R. 6-51,52). The trucker then delivered the trailers to Hyde Shipping,

where Hyde Shipping acknowledged receipt by execution of certain dock receipts (P.Ex.5). Hyde Shipping also received Precision Trading's commercial invoice and certain U.S. Customs forms. Hyde Shipping then issued Bill of Lading No. 127 (P.Ex.3).

With regard to VIANESSA's goods, Hyde Shipping received a shipper loaded and sealed container, along with invoices and U.S. Customs forms. Hyde Shipping also executed a dock receipt (P.Ex.8) and issued Bill of Lading No. 43 (P.Ex.4).

On Thursday, October 8, 1987, the ship left the Miami River bound for Belize. As it motored south, a tropical storm began to threaten the Caribbean. The ship anchored off the Florida Keys in order to determine the course of the storm, specifically whether it would pass forward or astern of the ship's position. Soon, the storm began to head towards the vessel's position, and the master attempted to return the ship to Miami. As the ship headed north, the tropical storm intensified, became Hurricane Floyd, and accelerated toward South Florida.

On October 12, 1987, the vessel was in the vicinity of the Miami sea buoy, tantalizingly close to safe harbor, when it was buffeted by huge waves and hurricane force winds. The pitch and roll of the vessel caused by these violent conditions eventually caused some lashing chains and turnbuckles to bend and break apart. As a consequence, a number of containers were lost over the side.

B. Procedural History

A large number of claims for damage to cargo were filed, including several lawsuits. The vessel owner,

BELIZE TRADING filed its Petition for Exoneration (R.1-1) and all claims were consolidated therein.

Virtually all claims were settled prior to trial, save for the claims of EL PIRATA (R.1-39) and VIANESSA (R.1-40; R.1-45). As a result of the settlements, BELIZE TRADING withdrew its Prayer for exoneration pursuant to agreement with opposing counsel (R.2-130) and the matter proceeded to trial solely on the issue of damages, and whether Petitioner was entitled to the $500 package limitation under COGSA. The matter was tried by the court in February 1991 (R.6,7,8). The court issued its Opinion and Order on June 24, 1991 (R.4-221).

After oral argument, a Panel of this Court reversed the trial court's Opinion and Order by Opinion dated June 21, 1993.

I.

THIS COURT SHOULD GRANT **EN BANC** RECONSIDERATION BECAUSE THE PANEL'S RULING THAT THE TERMS OF AN OCEAN BILL OF LADING ARE NOT EFFECTIVE UNTIL ACCEPTED BY THE SHIPPER OR CONSIGNEE CONFLICTS WITH ESTABLISHED MARITIME PRECEDENT.

The Panel ruled that the bills of lading were not "contracts" because they had not been "accepted" by either the shipper or the consignee. Implicit in this legal ruling was the Panel's factual finding that the bills of lading were issued after the vessel left port and the loss had occurred.[1]

[1]This factual finding is unsupported by the record. The bills of lading were prepared the day of loading (October 8, 1987), as conceded by Appellees. *See*, Appellee EL PIRATA's brief at 4. There was *no* evidence to show that the bills were prepared after the vessel left port.

A bill of lading constitutes a contract between the carrier and the shipper/consignee. Gilmore & Black, *The Law of Admiralty* §3-1 (2d Ed. 1975). It has long been accepted that the usual terms and conditions of the bill of lading control the relations between the parties, *even where* the bill of lading has been issued long after a loss. In *Luchenback Steamship Co., Inc. v. American Mills Co.*, 24 F.2d 704, 1928 AMC 558 (5th Cir.1928)[2], cargo was destroyed by fire prior to the issuance of a bill of lading. The Court held that the usual terms and conditions as set forth in the bill of lading controlled the contract between the parties. This agreement was fully valid, even where there were no prior dealings between the parties. *Baker Oil Tools, Inc.*, 900 F.2d 714, 1991 AMC 75 (4th Cir. 1990); *Mack Trucks, Inc. v. Farrell Lines, Inc.*, 1990 AMC 2669 (S.D.N.Y. 1990); *Mediterranean Marine Lines, Inc. v. John T. Clark & Son*, 485 F. Supp. 1330, 1980 AMC 1731 (D. Md. 1980).

It is impossible to reconcile the Panel's decision, that the bill of lading must be accepted by the shipper/consignee before it can become a contract, with substantial precedent that a bill of lading can be binding even if issued after the loss.

The rule of *Luchenback* and its progeny meshes well with the realities of commercial shipping. Bills of lading are frequently prepared near or at the time of sailing, depending in large degree as to when merchandise is received. It is not unusual for a carrier to receive containers for shipment only hours before sailing. *See*, R. 7-102; 8-22. In such circumstances, it would be virtually impossible to ensure "acceptance" of the bill of lading from the shipper/consignee prior to sailing. The better law is the

---

[2]Pre-1981 cases of the former 5th Circuit are binding precedent in this Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

precedent of *Luchenback*, which accepts the standard bill of lading as the implied contract between the parties. Indeed, one of the shippers in this case, Simon Beba, of Precision Trading, testified that he received his copy of the bill of lading in normal and customary time. R. 7-58,59.

Neither EL PIRATA nor VIANESSA should be heard to complain with the method of preparation of the bills of lading. Both were free to prepare bills of lading themselves, or to hire a freight forwarder to do so,[3] or even to prepare written "shipper's instructions" to the carrier. Both could also have declared a higher value for carriage at the *ad valorem* rate set forth in the tariff. *El PIRATA* and VIANESSA chose to do none of these things, but simply left the method of preparation up to Hyde Shipping.

The decision that a bill of lading does not constitute a contract between the shipper/consignee and the carrier unless "accepted" by the shipper/consignee conflicts with long established maritime law and prior decisions of this Court, and rehearing should be granted.

II.

THIS COURT SHOULD GRANT **EN BANC** RECONSIDERATION BECAUSE OF INHERENT CONFLICTS IN THE LAW RESULTING FROM THE PANEL'S RULING THAT COGSA REQUIRES ENUMERATION OF THE NUMBER OF CARTONS WITHIN A CONTAINER LOADED AND SEALED BY THE SHIPPER.

The Panel ruled that COGSA *mandated* that the carrier list the number of packages disclosed to the carrier,

[3]Testimony by El Pirata's supplier at trial was that a freight forwarder could be hired to prepare the bill of lading and all other necessary documents for a nominal fee of $60 to $100 (R.6-68).

via invoices and packing lists, concerning shipper loaded and sealed containers. In particular, the Panel relied on 46 USC § 1303(3)(b) as requiring the carrier to list the number of packages "as furnished in writing by the shipper."

The containers at issue were loaded and sealed by the shippers. It is uncontroverted that the carrier had no opportunity to see the goods, to verify the condition or quantity of the goods, or otherwise inspect the shipment. The trial court *did* find, however, that both VIANESSA and *EL PIRATA* failed to provide shipper's instructions to BELIZE TRADING (R.4-221-4), and that the documents supplied to the carrier were contradictory and incomplete. (R.4-221-7)

Recognizing the difficulty to carriers in such situations, COGSA provided, at 46 USC § 1303(3)(c), that the carrier was *not* required

> to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, **or which he had no reasonable means of checking.** (emphasis added)

This section of COGSA has been explicitly recognized to provide carriers with the means to protect themselves in case of doubt or lack of opportunity to inspect. *Woodhouse, Drake & Carey, Inc. v. M/V Righteous*, 710 F.2d 1523, 1984 AMC 479 (11th Cir. 1983); *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 1975 AMC 395 (9th Cir.1974). In *Woodhouse*, this Court cited with approval *Portland Fish*, which held, *inter alia*, that under 46 USC §1303 (3) (c):

COGSA expressly provides the means by which carriers, in case of doubt concerning the goods, may protect themselves and avoid liability if they choose to do so.

Portland Fish, at 633.

Neither EL PIRATA nor VIANESSA contests that their containers were loaded and sealed by the shipper, and that the containers were delivered in sealed condition to the carrier. The sealed containers prevented the carrier from a "reasonable means of checking" the number and/or quantity of goods (R.6-76) and, thus, the carrier was brought within the purview of the §1303(3)(c) proviso.

The section has also been used—as in the aforesaid cases—to create estoppel against a carrier who *does* make statements in the bill of lading. Recent cases have illustrated the problem this causes for the carrier. In *Continental Distributing Co. v. M/V "Sealand Commitment"*, 1992 AMC 1743 (S.D.N.Y. 1992), the cargo owner obtained summary judgment against the carrier for alleged pilferage from a shipper loaded and sealed container. The bill of lading listed the number of packages and weight given by the shipper. The court held that by listing the number of packages, the carrier represents that it has no reasonable ground for suspecting a variance in the number of packages actually received, and that it has reasonable opportunity to check the number of packages. *Id.*, at 1747. The court also specifically found that attempted reservations such as "said to contain" or "shipper's count" cannot be relied upon to escape liability, where the carrier's conduct amounts to a representation *Id.* at 1748. *See also, Judy-Philippine, Inc. v. S/S "Verazano Bridge"*, 781 F.Supp. 253, 1992 AMC 1773 (S.D.N.Y. 1991) *Samsung America, Inc. v. M/T "Fort Producer"*, 1993 AMC 29 (S.D.N.Y. 1992).

The decision of the panel places the carrier in an untenable position. If the carrier receives a packing list with the sealed container, then under the Panel's decision the bill of lading must reflect the number of packages set forth by the shipper, *even if* the carrier has no opportunity to check, or has reason to believe the count is wrong. However, by listing the count on the bill of lading, then the carrier can be held liable for variance from that count.

Such a situation is not mere speculation. In this case, one shipper (Vianessa) provided a loaded and sealed container. Vianessa also prepared an invoice which showed 481 cartons inside the container. (R.8-16; Vianessa Ex. 15). Under the Panel's decision, Belize Trading was required to list 481 cartons on the bill of lading. But Vianessa conceded at trial that the carton count was wrong, and that actually only 431 cartons were loaded. R 8-16.[4] Conceivably, a consignee armed with the bill of lading and the invoice could claim a loss of 50 cartons, and establish a *prima facie* case based on the documentation under the *Continental Distributing* line of cases. Under the Panel's decision, then, an unsuspecting carrier could face liability for nonexistent cargo, based solely on documentation mandated by this Court's opinion.

Moreover, it was uncontroverted that discrepancies in the documents could lead to problems with Customs officials in Belize, including seizure of the container and all of its contents. El Pirata, the consignee, agreed that Belize Customs could seize the shipment for misdescription. (R. 6-79,80; R. 6-46,47).

In this case, there were discrepancies and ambiguities in the documents. It is clear that of the three dock receipts issued by Hyde Shipping for EL PIRATA cargo, only one

[4]Vianessa was not even aware of the discrepancy until after trial started. R. 8-17.

contained a carton count (P.Ex.5). Moreover, the WDEX forms (U.S. Customs forms required for in-bond shipments) received from EL PIRATA's shipper were incomplete because not all goods were shipped in bond (P.Ex.6). While Hyde Shipping had the invoice and was able to prepare the Shipper's Export Declaration ("SED") form, the invoice listed the number of *pieces* in the shipment, not the number of cartons (P.Ex.10) (R.6-63-93).

With regard to VIANESSA, all goods were shipped in bond and, thus, were the subject of WDEX forms. The WDEX's for this shipment show 481 cartons; a handwritten note on WDEX No. 04747831 (P.Ex.7) shows reduction on one item from 341 cartons to 291 cartons. The invoice lists 340 units of that unit shipped, although the numerical totals on the invoice add up to only 290 units. Ashlok Kitchloo, of VIANESSA, *admitted* at trial that the piece counts shown in the invoice and dock receipts were incorrect and inaccurate (R. 8-16,20). These documents clearly present the type of contradictory information which the carrier sought to avoid in preparing the bills of lading.

The sum of the factual evidence presented in the case is that Hyde Shipping acted properly in listing the number of containers as the number of packages in the bill of lading.

CONCLUSION

The above premises considered, Appellee prays that the *en banc* Court reconsider the opinion of the Panel issued June 21, 1993, and affirm the judgment below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to William E. Cassidy, Esq., 8370 West Flagler St., Suite 252, Miami, FL 33144 and to Gerhardt A. Schreiber, Esq., Schreiber, Rodon-Alvarez, P.A., 890 South Dixie Highway, Miami, FL 33146 this 9 day of July, 1993.

HAYDEN AND MILLIKEN, P.A.
5915 Ponce de Leon Blvd.
Suite 63
Miami, Florida 33146
(305) 662-1523

By: /s/ [ILLEGIBLE]
William R. Boeringer, Esq.
Florida Bar No. 347191

APPENDIX G

EXPORTER *(Principal or seller-licensee and address including ZIP Code)*

PRECISION TRADING CORP.
1401 N.W. 88th AVE.
MIAMI, FLORIDA

ZIP CODE

33172

VOY.

03

B/L NO.

127

CONSIGNED TO

EL PIRATA DEL CARIBE
CHETUMAL Q. ROO MEXICO
VIA BELIZE C.A.

POINT (STATE) OR ORIGIN OR FTZ NUMBER

MIAMI, FL.

NOTIFY PARTY/INTERMEDIATE CONSIGNEE *(Name and address)*

UNIVERSAL CUSTOM BROKERS
BELIZE CITY, BELIZE C.A.

EXPORTING CARRIER

HYBUR TRADER

PORT OF LOADING/EXPORT

MIAMI, FLORIDA

LOADING PIER/TERMINAL

MIAMI RIVER

FOREIGN PORT OF UNLOADING *(Vessel and air only)*

BELIZE C.A.

TYPE OF MOVE

HOUSE TO HOUSE

CONTAINERIZED *(Vessel only)*

☒ Yes ☐ No

PARTICULARS FURNISHED BY SHIPPER

MARKS
ADDR.
8614

RATE
FLAT

NO. OF PACKS
3-40′

MARKS
ADDR.
8613
8612

DESCRIPTION OF PACKAGES AND GOODS
CONTAINER STC ELECTRONIC EQUIPMENT.

GROSS WEIGHT
54,270

MEASUREMENT
4800 CFT

*****FREIGHT COLLECT*****
EX 04873533; MIAMI, FLORIDA 10/06/87
EX 04873551; MIAMI, FLORIDA 10/06/87
EX 04873540; MIAMI, FLORIDA 10/06/87
EX 04873525; MIAMI, FLORIDA 10/06/87
EX 04873536; MIAMI, FLORIDA 10/06/87

CONTAINER NO.
INAU-291448-1
CTIU-484338-5
INBU-411244-0

SEAL NO.
HSC-025832 & 252396
HSC-025816 & 252395
HSC-025819& 252397

SHIPPER'S DECLARED VALUE $

	COLLECT	PREPAID
Ocean Freight	4,800.00	
Documentation	20.00	
Wharfage	27.14	
Handling	375.00	
INSURANCE		
DRAFT		
Inland Freight		
10% Com. on Disb.		
Advance Chgs.		
U.S. Drayage	358.50	
Bunker Surcharge		
Landing Chgs.	2,160.00	
TOTAL U.S. $	7,740.64	

INSURANCE VALUE: $ _____

THESE COMMODITIES LICENSED BY U.S. FOR ULTIMATE DESTINATION DIVERSION CONTRARY TO U.S. LAW PROHIBITED.

IN ACCEPTING THIS BILL OF LADING the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed or stamped on the front or back hereof, any local customs or privileges to the contrary notwithstanding.

IN WITNESS WHEREOF, the Master of said ship has affirmed to (Number) 3 bills of lading, all of this tenor and date, ONE of which being accomplished the others to stand void.

By HYDE SHIPPING CORP. _____ Agent
FOR THE MASTER

INV. NO. _____

Signed /s/ FRANCIS TORRES _____

OCT DAY 08 YEAR 1987

APPLICABLE ONLY WHEN DOCUMENT USED AS A THROUGH BILL OF LADING.

APPENDIX H

EXPORTER *(Principal or seller-licensee and address including ZIP Code)*

VIANESSA
1854 N.W. 82nd AVENUE
MIAMI, FLORIDA

ZIP CODE

33126

VOY.

003

B/L NO.

43

CONSIGNED TO

TRIPOLI IMPORTADORA (GABY AFIF)
CHETUMAL, Q. ROO MEXICO

POINT (STATE) OR ORIGIN OR FTZ NUMBER

MIAMI, FLORIDA

NOTIFY PARTY/INTERMEDIATE CONSIGNEE *(Name and address)*

SAME AS CONSIGNEE

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

ORIGINAL B/L

EXPORTING CARRIER

M/V HYBUR TRADER VOY. #00[Illegible]

PORT OF LOADING/EXPORT

MIAMI, FLORIDA

LOADING PIER/TERMINAL

MIAMI RIVER

FOREIGN PORT OF UNLOADING *(Vessel and air only)*

BELIZE CITY, BELIZE C.A.

TYPE OF MOVE

HOUSE TO HOUSE

CONTAINERIZED *(Vessel only)*

☒ Yes ☐ No

PARTICULARS FURNISHED BY SHIPPER

MARKS
AS ADDR.
OR # 8631

RATE
FLAT

NO. OF PACKS
1x20′

DESCRIPTION OF PACKAGES AND GOODS
CONT. S.T.C. COLOR TELEVISION SETS, RADIO CASSETTE RECORDERS

GROSS WEIGHT
9,920 lbs

MEASUREMENT
800 C

*****FREIGHT COLLECT*****
WDEX 04747831; 10/02/87; MIAMI, FLORIDA
WDEX 04747842; " " "
WDEX 04747820; " " "
WDEX 04747853; " " "

CONTAINER NO.
H-796

SEAL NO.
HSC25585 & 6971

SHIPPER'S DECLARED VALUE $

	COLLECT	PREPAID
Ocean Freight	800.00	
Documentation	20.00	
Wharfage	4.96	
Handling	50.00	
INSURANCE		
DRAFT		
Inland Freight		
10% Com. on Disb.		
Advance Chgs.		
U.S. Drayage	75.00	
Bunker Surcharge		
Landing Chgs.	225.00	
TOTAL U.S. $	1174.96	

INSURANCE VALUE: $ _____

THESE COMMODITIES LICENSED BY U.S. FOR ULTIMATE DESTINATION DIVERSION CONTRARY TO U.S. LAW PROHIBITED.

IN ACCEPTING THIS BILL OF LADING the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed or stamped on the front or back hereof, any local customs or privileges to the contrary notwithstanding.

IN WITNESS WHEREOF, the Master of said ship has affirmed to (Number) 3 bills of lading, all of this tenor and date, ONE of which being accomplished the others to stand void.

By HYDE SHIPPING CORP. _____ Agent

FOR THE MASTER

INV. NO. _____

Signed /s/ FRANCIS TORRES

MONTH 10 DAY 08 YEAR 1987

APPLICABLE ONLY WHEN DOCUMENT USED AS A THROUGH BILL OF LADING.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 91-5616
91-5842

IN RE: THE COMPLAINT OF BELIZE TRADING, LTD. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF THE M/V HYBUR TRADER

Petitioner / Appellee

EL PIRATA DEL CARIBE, S.A.

Appellant / Claimant

On Appeal from the United States District Court
Southern District of Florida, Miami Division

BRIEF OF APPELLANT/CLAIMANT
EL PIRATA DEL CARIBE, S.A.

GERHARDT A. SCHREIBER, ESQUIRE
SCHREIBER, RODON-ALVAREZ, P.A.
890 South Dixie Highway
Coral Gables, Florida 33146
Telephone: (305) 662-2629

Counsel for Appellant
El Pirata del Caribe, S.A.

Precision loaded and sealed each container. During loading, Precision counted the number of cartons placed in each container and prepared packing lists showing the container, seal number and number of cartons in each container (R6-52, R6-54). Hyde arranged for the pick up of the loaded containers with the driver signing the packing lists as receipt of the containers. The containers were delivered to Hyde for loading on the vessel.

In addition to the containers, Hyde received copies of Precision's invoices, copies of WDEX forms (United States Customs forms for exporting in-bond merchandise) and the three packing lists (R6-53).

On October 8, 1987, from the documents received, Hyde prepared bills of lading number 127 and the Shipper's Export Declaration (SED) (R4-221). It was Hyde's usual and normal practice to show the number of cartons in each container on the bill of lading. If the information, i.e., number of cartons, was not supplied, Hyde would call and ask the supplier "what is inside, whether or not they gave us the number of cartons" (R6-73; R6-94). If Hyde had the information, "I will put it on the bill of lading" (R6-93). The trial court found that Hyde received the information (R4-221). In spite, of its usual, normal and past practice, Hyde did not show the number of cartons in each container on the bill of lading. Precision did not receive a copy of the bill of lading until after the lost (R6-56). In all previous bills of lading, ten prior shipments, issued by Hyde on behalf of El Pirata, the number of cartons was shown on the face of the bills of lading (EP-5, EP-6). On at least one prior shipment, the number of cartons was shown on the bill of lading under exactly the

same circumstances, documents and procedure as this incident (R6-53, EP-5).

On or about October 8, 1987, El Pirata's three containers were loaded on board the M/V "Hybur Trader" which departed for Belize. Subsequently, the vessel encountered heavy weather and upon returning to Miami lost, over-board, two of El Pirata's three containers. Both El Pirata and Precision had no notice of Hyde's departure of past procedure until after the loss (R6-56). The fair market value in Chetumal, Mexico of the lost cargo at the time of the loss was $150,850.00 (R6-56), plus 20% profit (R6-43).

Supreme Court, U.S.
FILED
DEC - 7 1993
OFFICE OF THE CLERK

NO. 93-765

in the Supreme Court of the United States

October Term, 1993

BELIZE TRADING, LTD. and HYBUR LTD.
Petitioners,

v.

EL PIRATA DEL CARIBE, S.A. and VIANESSA, INC. and TRIPOLI IMPORTADORA, C.A. f/u/b/o INSURANCE COMPANY OF NORTH AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Gerhardt A. Schreiber, Esq.
Schreiber, Rodon-Alvarez
890 South Dixie Highway
Miami, Florida 33146
Telephone: (305) 662-2629
Attorneys for Respondent
El Pirata Del Caribe, S.A.

William E. Cassidy, Esq.
Law Offices of William E. Cassidy
8370 West Flagler Street
Miami, Florida 33144
Telephone: (305) 559-4962
Attorneys for Respondents
Vianessa and Tripoli

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit failed to properly apply Section 1303(3) of the Carriage of Goods by Sea Act, 46 U.S.C. §1303(3), by ruling that such section mandates a carrier to show on an ocean bill of lading the number of packages in each container as furnished in writing by the shipper.

2. Whether the United States Court of Appeals for the Eleventh Circuit's ruling that, under the specific facts of this case, the ocean bills of lading were not effective conflicts with established maritime precedents.

LIST OF PARTIES

Petitioner, Belize Trading (Belize), is a foreign company which, at all times material, was the owner of the M/V "HYBUR TRADER."

Petitioner, Hybur Ltd., operated the M/V "HYBUR TRADER", and was a common carrier by water for hire.

Hyde Shipping Corporation (Hyde), a Miami based corporation, provided agency services to the M/V "HYBUR TRADER".

Respondent, El Pirata Del Caribe, S.A. (El Pirata), was the consignee and owner of certain goods to be shipped on the M/V "HYBUR TRADER".

Precision Trading Corporation (Precision), was the shipper of El Pirata's goods.

Respondent, Vianessa, Inc. (Vianessa), was the shipper of the goods of Respondent, Tripoli Importadora, S.A. (Tripoli).

Insurance Company of North America was the insurer of Vianessa's cargo and paid the loss.

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STATEMENT OF THE CASE

Facts

Other than the fact that the vessel encountered inclement weather and a number of cargo containers were lost, including one container belonging to Claimant, Vianessa, and two containers belonging to Claimant, El Pirata (App. C-2) there is no evidence in the record to support the last two paragraphs of Petitioner's "Factual History". In fact, much of the last two paragraphs of Petitioner's "Factual History" are simply untrue.

In addition to the other facts stated by the Petitioner, Respondents would add the following:

Hyde received Precision's three packing lists showing the number of packages in each container prior to the preparation of the bill of lading.

Hyde received invoices from Vianessa showing the number of packages in each container prior to the preparation of the bills of lading.

It was the normal and usual practice of Hyde to prepare bills of lading and Shipper's Export Declarations from the information received from the shipper (invoices, packing lists, etc.). If the documents received did not indicate the number of packages in each container Hyde would call the shipper for the information. Hyde's normal and usual practice was to show on the bills of lading the number of packages in each container.

Prior to the preparation of the bills of lading Hyde had knowledge of the number of packages in each container.

Prior to the preparation of the bills of lading, Hyde issued dock receipts to Vianessa that indicated the specific number of cartons in the sealed container. (App. C-3)

Hyde did not prepare the bills of lading in its normal and usual manner, which fact was unknown to the shippers and consignees until after the loss of the cargo.

Summary of Argument

The shippers furnished in writing to the carrier the number of packages in each container and their weight. The Carriage of Goods By Sea Act, 46 U.S.C. §1303(3), requires the carrier to show on the bill of lading the information furnished by the shipper. Without cause or reason Hyde failed to comply with the requirements of the Act.

Petitioner's form bill of lading required acceptance by the parties. Hyde failed to prepare the bill of lading in the normal and usual manner by failing to show on the bills of lading the number of packages in each container, a fact unknown to the shippers/consignees until after the lost. Under these facts the Eleventh Circuit was correct in holding that there was no agreement between the parties.

There is no conflict with established maritime law and the petition should be denied.

ARGUMENT

I

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY APPLIED SECTION 1303(3) OF THE CARRIAGE OF GOODS BY SEA ACT 46 U.S.C. §1300.

Section 1303(3) of The Carriage of Goods By Sea Act clearly requires the carrier to issue a bill of lading showing either the number of packages or the quantity or weight as furnished by the shipper. 46 U.S.C. §1303(3). Respondents provided, in writing, the carrier the number of packages in

each container. There was no evidence that the carrier had "reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking".

The cases relied upon by the Petitioner deal with the doctrine of estoppel when there was detrimental reliance on the description that appeared in the bill of lading by a holder in due course. In *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628 (9th Cir. 1974), the court clearly stated:

> "Thus the doctrine is not applicable in a suit by a shipper against a carrier,[12] or where reliance on the description by a holder for value is not reasonable,[13] or where the holder does not rely on the description at all.[14]" *Id.* at 633, footnotes omitted.

The case at bar is a suit by shippers/consignees against a carrier and not one by a holder in due course in reliance on the description in the bills of lading and, therefore, the cases cited by the Petitioner are not applicable. The requirement of COGSA does not create an undue burden on the carrier in its dealings with shippers concerning the description in the bill of lading. The Eleventh Circuit's holding does not render Section 1303(3) of COGSA null and void and was correct in finding that Hyde "failed to adhere to the law".

II

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT'S RULING THAT THE BILL OF LADING WAS NOT EFFECTIVE UNTIL ACCEPTED BY THE SHIPPER OR CONSIGNEE WAS CORRECT AND DOES NOT CONFLICT WITH ESTABLISHED MARITIME PRECEDENT.

The holding that the bills of lading were not contracts is fully supported by the specific facts of this case and the applicable law.

The Eleventh Circuit's ruling is based on the express language of Petitioner's bill of lading which required acceptance by the shipper, consignee and owner. (App. A-7).

Additionally, the cases relied upon by the Petitioner do not support its contentions that the ruling conflicts with established maritime law. In *Luckenbach S.S. Co., Inc., v. American Mills Co.*,24 F.2d 704 (5th Cir. 1928) the court held that:

> "... [A]n implied understanding arose from common business experience that the carrier would issue such bill of lading as it was its custom to issue to shippers in the usual course of its business" *Id.* at 705.

Also, the Petitioner fails to understand the difference between preparation of the bills of lading and issuance of the bills. The record clearly establishes that the bills of lading were prepared on or about October 8, 1987, but were not received by the shippers/consignees until after the loss.

In this case, had Hyde followed its normal, usual and customary practice of showing the number of packages in each

container as furnished by the shippers and had adhered to the requirements of Section 1303(3) of COGSA there would be no dispute.

CONCLUSION

Belize is attempting to profit from their failure to follow their own course of business and their failure to adhere to the applicable law. There is no conflict with established maritime law or misapplication of the requirements of COGSA. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Gerhardt A. Schreiber, Esq.
SCHREIBER,RODON-ALVAREZ
890 South Dixie Highway
Miami, Florida 33146
Telephone: (305) 662-2629
Attorneys for Respondent
El Pirata Del Caribe

William E. Cassidy, Esq.
Law Offices Of William E. Cassidy
8370 West Flagler Street
Suite 252
Miami, Florida, 33144
Telephone: (305) 559-4962
Attorneys for Respondents
Vianessa, Inc. et. al.

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